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SCSL-2003-05-PT
(1620-1669)

1620

IN THE SPECIAL COURT FOR SIERRA LEONE

Before: Judge Bankole Thompson, Presiding Judge
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr. Robin Vincent

Date filed: 20 October 2003

THE PROSECUTOR

Against

ISSA HASSAN SESAY
(Case No. SCSL 2003-05-PT)

DEFENCE MOTION TO REQUEST THAT THE TIME PERIOD FOR RESPONSE TO THE PROSECUTION MOTION FOR JOINDER COMMENCE UPON THE RECIEPT OF THE MODIFIED OR PARTICULARIZED INDICTMENT(S) OR ON A DATE TO BE SET BY THE TRIAL CHAMBER

Office of the Prosecutor:

Luc Cote, Chief of the Prosecution
Robert Petit, Senior Trial Counsel

Defence Counsel:

William Hartzog, Lead Counsel
Wayne Jordash, Co-Counsel
Abdul Serry Kamal, Co-Counsel

INTRODUCTION

1. On October 13, 2003, the Honourable Bankole Thompson, acting for the Trial Chamber in virtue of his nomination under Rule 28. of the Rules of Procedure for the Special Court of Sierra Leone, rendered his decision on the DEFENCE MOTION ON DEFECTS IN THE INDICTMENT.

2. In rendering the judgment on the said Defence Motion Judge Thompson ordered, inter alia (**The Order**):

    a. that the Prosecution elect either to delete in every count and whenever it appears in the Indictment the phrase "but not limited to those events" or to provide a Bill of Particulars specifying additional events alleged against the Accused in each count;

    b. that the aforesaid amended Indictment or Bill of Particulars be filed within 21 days of the service of the said decision and also on the Accused according to Rule 50 of the Rules (Annexure Para. ii & iii).

3. On the 9th October 2003 the Prosecution filed, pursuant to Rule 73 and Rule 48(B) of the Rules a request that the Accused be jointly tried with the following accused persons: Kallon, Brima, Gbao, Kamara and Kanu ("**the Joinder Application**").

4. The Defence bring this motion in response to the Joinder Application and in light of **The Order** which stipulates that the Prosecution must strike the impugned language from the indictment or provide a bill of Particulars . It is respectfully submitted that the Defence are unable, until receipt of

    a. its own amended or particularized indictment and,

    b. the amended or particularized indictments, should this occur, of the other accused the prosecution proposes to join in a common trial specifically Mssrs..Kallon, Brima, Gbao, Kamara and Kanu (the "Other Accused"), to properly consider the merits of the Prosecution application and thereafter to appropriately respond.

5. The Accused therefore submits that the provisions of Rule 7(C) ought not to apply until The Prosecution has opted for one of the two alternative approaches set out in the Order and has served the modified indictment or Bill of Particulars on the Accused and on Defence Counsel.

THE LAW

6. The Defence agree with the prosecution insofar as paragraphs 6 – 8 of the Joinder Application state the applicable Rules. In particular:

    a. Rule 48(B) of the Rules state that "persons who are separately indicted, accused of the same or different crimes committed in the

course of the same transaction, may be tried together, with leave granted by the Trial Chamber pursuant to Rule 73".

b. The term "transaction" is defined in Rule 2(A) as "(a) number of acts or omissions whether occurring as one event or a number of events, at the same time or different locations and being part of a common scheme, strategy or plan".

c. Rule 82(B) of the Rules stipulates that "the Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an Accused, or to protect the interests of justice".

7. The Defence submits that, in light of these Rules, the merits of the Joinder Application cannot be determined;

a. On the basis of an indictment which breaches the doctrine of "fundamental fairness" (see paragraph 33 of "The Order")

b. On the basis of an indictment which does not specify "the precise allegations against the Accused" (see paragraph 33 of the Order),

c. On the basis of an indictment, which by the Prosecution's own admission, is incomplete insofar as "there may be events not specifically alleged in the Indictment" (paragraph 23 of the Response).

d. On the basis of an indictment which may not contain the full complement of the acts or omissions ("whether occurring as one event or a number of events") alleged to have been committed in the course of the alleged transactions.

8. It can also be inferred from paragraph 33 of the Order that the Order implicitly applies to indictments of the 'Other Accused". The Prosecution submit that the "indictments against the Accused..... are almost identical. The material facts alleged in all the indictments are the same except personal particulars" (Para. 19 of the Joinder Application). In the absence of appropriate modifications or particularizations to the said indictments, it is submitted, that the assertion of identical character of the indictments cannot be verified by the defence or the Trial Chamber.

9. Consequently the defence submit that the Accused is unable to properly consider whether;

a. his alleged acts or omissions are connected to material elements of a criminal act;

b. the criminal acts to which the acts of the accused are alleged to be connected are capable of specific determination in time and space and,

c. the criminal acts which the accused is alleged to be connected illustrate the existence of a common scheme, strategy or plan.

The Prosecutor v Ntabakuze et al, ICTR – 97 – 34 – I, Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998.

10. Additionally the defence takes note of the prosecution concession in paragraph 13 of the Joinder Application. It is submitted that, insofar as it is stated, "In deciding whether a number of acts or events were committed in the course of the transaction, a Trial Chamber must base its determination upon the factual allegations contained in the indictment" the prosecution have correctly stated the position.

11. It is therefore respectfully submitted that in the absence of the aforementioned information the defence are unable to properly determine the merits of the Joinder Application and/or the consequential merits of any proposed application pursuant to Rule 82(B). In short the defence are unable to frame a meaningful response within the time constraints imposed by Rule 7(C).

THE ORDER SOUGHT

12. For all the reasons discussed above, Counsel for the Accused prays the Trial Chamber to order that the start of the time limit for the Defence Response to the "Joinder Application" be suspended until at least the date upon which the Defence receives the modified or particularized indictment from the Prosecution.

13. Counsel also respectfully pray that the Trial Chamber allow them to reserve the right to make a further motion in respect of the appropriate time period for response in light of the nature of any amendments or particularization of the indictment of the accused or to the various indictments of other accused whose trial joinder is contemplated by the Prosecution Motion for Joinder,.

Respectfully submitted

Done in Freetown on this day of October 2003

William Hartzog
Lead Counsel for Issa Hasssan Sesay

Wayne Jordash Co-Counsel for Issa Hassan Sesay	Abdul Serry Kamal Co-counsel for Issa Hassan Sesay

DEFENCE BOOK OF AUTHORITIES

1. The Prosecutor v Ntabakuze et al, ICTR – 97 – 34 – I, Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998

PROSECUTION AUTHORITIES

6. *The Prosecutor v. Ntabakuze et al.*, ICTR-97-34-I, Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998.

UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

OR:ENG.

Before: Judge William H. Sekule, Presiding Judge
Judge Yakov A. Ostrovsky
Judge Tafazzal H. Khan

Registry: Mr. John Kiyeyeu

THE PROSECUTOR
VERSUS
ALOYS NTABAKUZE
GRATIEN KABILIGI
Case No. ICTR-97-34-I

DECISION ON THE DEFENCE MOTION REQUESTING AN ORDER FOR SEPARATE TRIALS

For the Office of the Prosecutor:

Mr. William Egbe

For Aloys Ntabakuze:

Ms. Simonette Rakotondramanitra

For Gratien Kabiligi:

Mr. Jean Yaovi Degli

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal")

SITTING as Trial Chamber II, composed of Judge William H. Sekule, Presiding, Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan (the "Trial Chamber");

CONSIDERING THAT a joint indictment was issued against Aloys Ntabakuze and Gratien Kabiligi and confirmed on 15 October 1997, by Judge Aspegren, pursuant to rule 47 of the Rules, on the basis that there was sufficient evidence to provide reasonable grounds for indicting them for Genocide, Crimes Against Humanity, Complicity in Genocide, Violations of Article 3 Common to the 1949 Geneva Conventions and the Additional Protocol II of 1977 thereto, as alleged in the indictment;

BEING SEIZED NOW OF defence Motions filed on 23 February 1998, based on rule 72 of the Rules of Procedure and Evidence ("the Rules") requesting the Trial Chamber to order for the separation of trials;

CONSIDERING THAT on 11 May 1998, the Prosecution filed a consolidated reply in which it responded on the issue of separate trials for both Aloys Ntabakuze and Gratien Kabiligi;

TAKING INTO CONSIDERATION the provisions of rules 48 and 82(B) of the Rules which address the issues of joinder of accused and separation of trials respectively;

HAVING HEARD the arguments of the parties on 14 May 1998, the Trial Chamber hereby submits a combined Decision on the issue of separate trials for both Aloys Ntabakuze and Gratien Kabiligi.

PLEADINGS BY THE PARTIES

The Defence Submitted:

(i) that the requirements of rule 48 of the Rules were not satisfied because the Prosecutor had failed to demonstrate the *same transaction*;

(ii) that a joint trial of both accused could lead to unnecessary delays and serious prejudice to the accused; and

(iii) that having separate trials would be in the interests of justice since it would favour a clear appreciation of the case against each accused.

The Prosecutor Submitted:

(i) that pursuant to the Rules, the *scheme, strategy or plan* need not be criminal in nature since rules 48 and 2 of the Rules simply refer to the *same transaction* and to *acts and omissions* respectively;

(ii) there existed a *common scheme, strategy or plan* to consolidate power by the Hutus. Given that Aloys Ntabakuze, as a Commander of the Para-Commando Battalion, was under the direct command of Gratien Kabiligi it is evident that the relevant crimes alleged in the indictment were committed as part of the *same transaction*.

(iii) that no prejudice would result from a joint trial of the accused because witnesses who will be called by the Prosecutor are likely to be the same. In any event, in the case of separation

of the trials, there would be considerable duplication of witness testimonies;

(iv) that in the final analysis, a joint trial will be in the interest of justice.

DELIBERATIONS

We have considered the party's submissions and make the following observations:

Same Transaction:
Rule 48 of the Rules permits the joinder of accused if they have been charged with the same crime or with different crimes committed *in the course of the same transaction.* We have also noted the definition of *same transaction* in rule 2 of the Rules which refers to "a number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan."

The issue of the interpretation of '*same transaction*' has been raised by the Defence for Kabiligi (Defence Motion at p.6) and the Prosecutor (Prosecutor's Reply at p.5). In *Prosecutor v. Clement Kayishema and Obed Ruzindana* the Trial Chamber's Decision on the Motion of the Prosecutor to Sever, to Join in a Superseding Indictment and to Amend the Superseding Indictment, dated 27 March 1997, (the "Joinder Decision") opined;

> "that involvement in the same transaction must be connected to specific material elements which demonstrate on the one hand the existence of an offence, of a criminal act which is objectively punishable and specifically determined in time and space, and on the other hand prove the existence of a common scheme, strategy or plan, and that the accused, therefore, acted together in concert."

The above interpretation has created argument as to whether the acts or omissions which are alleged to form the *same transaction* necessary for joinder ("acts of the accused") must be criminal / illegal in themselves, or not. This Trial Chamber is of the opinion that the acts of the accused need *not* be criminal / illegal in themselves. However, the acts of the accused should satisfy the following:

1. Be *connected to* material elements of a criminal act. For example, the acts of the accused may be non-criminal / legal acts in furtherance of future criminal acts;
2. The criminal acts which the acts of the accused are connected to must be capable of specific determination in time and space, and;
3. The criminal acts which the acts of the accused are connected to must illustrate the existence of a *common scheme, strategy or plan.*

In determining whether the same transaction exists for the purposes of joinder, the Trial Chamber will consider the facts and evidence as a whole using the above guidelines for direction. However, these guidelines are not intended to be a rigid, insurmountable three prong test. For the purpose of joinder, in the absence of evidence to the contrary, the Trial Chamber shall act upon the Prosecutor's factual allegations as contained in the indictment and related submissions.

The Prosecutor's allegations which, at this stage, suggest the existence of same transaction include: Gratien Kabiligi and Aloys Ntabakuze had command over military groups; Gratien Kabiligi had military responsibility over Aloys Ntabakuze; the two attended, or were briefed on the substance of, weekly security meetings which discussed, *inter alia*, the massacres of Tutsis; military personnel

under the command of both the accused committed criminal acts; neither of the two accused took steps to punish persons under their control who were responsible for these criminal acts. The Defence failed to refute these factual allegations. 1629

The Prosecutor's allegations which, at this stage, illustrate criminal acts determined in time and space include: the killing of civilians at roadblocks set up in Kigali by troops under the command of the accused; Aloys Ntabakuze's incitement of troops under his command to avenge the death of President Habyarimana; Gratien Kabiligi's incitement of Interahamwe militia to kill Tutsis; Gratien Kabiligi's order to kill a Tutsi soldier and his family; Gratien Kabiligi's order to kill Tutsi's taking refuge in St. Andre School in Kigali. The Defence also failed to refute these factual allegations.

Taking into consideration all these facts, for the purposes of this procedural Decision, the Trial Chamber is of the opinion that there is a reasonable showing that the two accused had a common scheme, strategy, or plan. Accordingly, there is a sufficient showing to satisfy the requirement of *same transaction.*

Interests of Justice / Prejudice to Accused:
The Trial Chamber has considered the Prosecutor's submission that she is likely to produce the same witnesses and adduce the same evidence against the two accused. Indeed, separate trials may cause unnecessary pressure on survivors and other witnesses who may be called upon to testify. In these circumstances, we find that a joint trial may, in fact, further judicial efficiency and enhance the accused right to be tried without undue delay.

The Defence have not shown that a joint trial would prejudice the accused or that it would not be in the interests of justice.

Therefore, considering the concise statement of facts attached to the indictment as well as the party's motions, we hold that the joinder of the two accused in one indictment is proper and is within the scope of rule 48 of the Rules.

FOR ALL ABOVE REASONS, THIS TRIAL CHAMBER

DENIES the Defence request for separate trials.

DISMISSES the Defence motions of Gratien Kabiligi and Aloys Ntabakuze so far as they relate to a request for separate trials.

Arusha, 30 September 1998

William H. Sekule	Yakov A. Ostrovsky	Tafazzal H. Khan
Presiding Judge	Judge	Judge

Seal of the Tribunal

PROSECUTION AUTHORITIES

7. *Prosecutor v Krajišnik*; *Prosecutor v Plavši}*, IT-00-39-PT and IT-00-40-PT, Decision on Motion for Joinder, 23 February 2001.

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IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar:
Mr. Hans Holthuis

Decision of:
23 February 2001

PROSECUTOR

v.

MOMCILO KRAJISNIK

PROSECUTOR

v.

BILJANA PLAVSIC

DECISION ON MOTION FOR JOINDER

Office of the Prosecutor:

Ms. Brenda J. Hollis

Counsel for the Accused:

Mr. Goran Neskovic for Momcilo Krajisnik
Ms. Jasminka Jovisevic for Biljana Plavsic

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal"),

BEING SEISED of the "Prosecution's Motion for Joinder of Accused" filed by the Office of the Prosecutor ("Prosecution") in *Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39 and in *Prosecutor v. Biljana Plavsic*, Case No. IT-00-40, on 23 January 2001, requesting an order for a joint trial of the two accused,

NOTING the confidential "Motion of the Defendant Mr. Momcilo Krajisnik in Opposition to Prosecution's Motion for Joinder of Accused, of 23 January 2001, and for Reservation of Rights", filed on 5 February 2001 and the confidential "Defence's Response to the Prosecution's Motion for Joinder of Accused" filed by the defence for Biljana Plavsic on 12 February 2001,

CONSIDERING that Momcilo Krajisnik and Biljana Plavsic are accused of identical crimes committed in the course of the same transaction within the same time frame and in the same locations,

CONSIDERING that a joint trial would accelerate the trial of one of the accused, Biljana Plavsic, without prejudice to her or to the rights of the other accused, avoid duplication of evidence, minimise hardship caused to witnesses in travelling to the seat of the International Tribunal in order to testify, and is generally in the interests of judicial economy,

CONSIDERING that the Defence has not made out a case of any conflict of interests within the meaning of Rule 82 (B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"),

CONSIDERING therefore that the interests of justice and a fair trial would be best served by a joint trial in this case,

PURSUANT TO Articles 20 and 21, paragraph 4 (c), of the Statute and Rules 48 and 82 of the Rules,

HEREBY ORDERS that the trial of Biljana Plavsic be joined to the trial of Momcilo Krajisnik, and that the Prosecution submit within 14 days of this decision a consolidated indictment on which the joint trial will proceed,

AND FURTHER REQUESTS the Registry to determine and assign to the joined cases a new case number; all documents filed in those joined cases shall bear this new number as from the day of this decision.

Done in English and French, the English text being authoritative.

_____
Richard May
Presiding

Dated twenty-third day of February 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

PROSECUTION AUTHORITIES

8. *The Prosecutor v. Bagosora et al.*, ICTR-96-7, Decision on the Prosecutor's Motion for Joinder, 29 June 2000.

ICTR-97-41-I
29-6-2000
(3425-3388)

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UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

OR: ENG

Before: Judge Lloyd George Williams, Presiding
Judge William H. Sekule
Judge Pavel Dolenc

Registrar: Dr. Agwu Ukiwe Okali

Decision of: 29 June 2000

THE PROSECUTOR
v.
Théoneste BAGOSORA
Case No. ICTR-96-7

THE PROSECUTOR
v.
Gratien KABILIGI and Aloys NTABAKUZE
Case No. ICTR-97-34 and Case No. ICTR-97-30

THE PROSECUTOR
v.
Anatole NSENGIYUMVA
Case No. ICTR-96-12

DECISION ON THE PROSECUTOR'S MOTION FOR JOINDER

The Office of the Prosecutor:
Carla Del Ponte
David Spencer
Frederic Ossogo
Holo Makwaia
Counsel for Théoneste Bagosora:
Raphaël Constant
Counsel for Gratien Kabiligi:
Jean Yaovi Degli
Counsel for Aloys Ntabakuze:
Clemente Monterosso
Counsel for Anatole Nsengiyumva:
Kennedy Ogetto
Gershom Otachi Bw'omanwa

1. **THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the "Tribunal")

SITTING as Trial Chamber III, composed of Judge Lloyd G. Williams, presiding, Judge William Sekule (as assigned by the President) and Judge Pavel Dolenc (the "Trial Chamber");

BEING NOW SEIZED OF the Prosecutor's "Motion for Joinder" (the "Motion") filed on 31 July 1998;

CONSIDERING the "Brief in Support of the Prosecutor's Motion for Joinder of the Accused" (the "Brief"), filed on 31 July 1998, the "Corrigendum to the Brief in Support of Prosecutor's Motion for Joinder of Accused" (the "Corrigendum"), filed on 13 August 1998;

CONSIDERING Nsengiyumva's "Preliminary Objection by the Defence on the Competence of the Prosecution Motions for Joinder of Accused Persons and Leave to File Amended Indictment and on the Composition of the Trial Chamber" filed on 23 September 1998, insofar as it relates to joinder;

CONSIDERING Nsengiyumva's "Response by the Defence to the Prosecutor's Motion for Joinder of the Accused" filed on 25 September 1998;

CONSIDERING the "Prosecutor's Brief in Reply to the [Nsgeniymva's] Defence Response to Prosecutor's Motion for Joinder of Accused" filed on 21 May 1999;

CONSIDERING Kabiligi's "Submissions in Reply to the Prosecutor's Motions for Joinder and Amendment of the Indictment" filed on 12 October 1998, insofar as it relates to joinder;

CONSIDERING the "Prosecutor's Brief in Reply to the Response by Counsel for the Accused Gratien Kabiligi to the Prosecutor's Request for Leave to File an Amended Indictment and Motion for Joinder of Trials" filed on 14 October 1998, insofar as it relates to joinder;

CONSIDERING Kabiligi's "Additional Defence Brief in Reply to the Prosecution Motion and Brief to Amend the Indictment and for Joinder, as well as an Objection Based on Lack of Jurisdiction" filed on 11 January 1999, insofar as it relates to joinder;

CONSIDERING Kabiligi's "Defence Brief in Reply to the Prosecutor's Motion for Joinder of Accused " filed on 14 July 1999;

CONSIDERING Bagosora's "Defence Brief on the Joinder of Accused" filed on 22 July 1999;

CONSIDERING Ntabakuze's "Defence Response to the Prosecutor's Motion for Joinder of Accused" filed 26 July 1999;

CONSIDERING Ntabakuze's oral motion made by his Defence Counsel on 1 December 1999 for lack of jurisdiction because the Prosecutor's motion does not contain an affidavit with respect to allegations based on facts in dispute;

HAVING HEARD the arguments of the Prosecutor and Defence Counsel for Bagosora, Kabiligi, Ntabakuze and Nsengiyumva on 1 and 2 December 1999, and having heard the arguments of the Prosecutor and Defence Counsel for Kabiligi, Ntabakuze and Nsengiyumva on 7 and 8 February 2000 on a number of related motions and having considered those motions and submissions before rendering this decision;

NOW DECIDES this matter.

PRELIMINARY SUBMISSIONS

2. Counsel for Ntabakuze raises a preliminary matter before the commencement of the Prosecutor's motion. Counsel raises an oral motion to strike the Prosecutor's motion on the grounds that it does not include an affidavit, as set out in Article 27 (2) (iii) of the Directive for the Registry of the International Criminal Tribunal for Rwanda (the "Directive for the Registry"), and thus that it is not a motion within the jurisdiction of the Tribunal.

3. In response to this motion, the Prosecutor submits that Defence Counsel had not included an affidavit with his motion. The Prosecutor argues that it is not the practice at the Tribunal to include affidavits with all motions. Finally, the Prosecutor submits that the proceedings before the Trial Chamber are controlled by the Statute of the International Tribunal for Rwanda (the "Statute") and the Rules of Procedure and Evidence (the "Rules") and are not subject to the Directive for the Registry.

THE SUBMISSIONS OF THE PROSECUTOR

4. The Prosecutor argues that the Motion is well founded in law, and in fact, that joinder is in the interests of justice, and that joinder will not prejudice the rights of the accused.

The Law

5. In the Brief the Prosecutor relies on Rules 2 and 48 of the Rules. The Prosecutor submits that the Motion is well founded under the common law "same transaction" test and civil law test of "*connexité.*"

6. The Prosecutor submits that an order for joinder can be made under Rule 48. It is the Prosecutor's position that if it were necessary to apply Rule 48 *bis*, it could be done retroactively because the rule does not affect the substantive rights of the

accused. However, the Prosecutor submits that it is not necessary to do so. The Prosecutor relies on *Prosecutor v. Ntagerura and Others*, Case ICTR-96-10-1 (Decision on the Prosecutor's Motion for Joinder) (11 October 1999) (the "*Cyangugu* Joinder Decision") and *Prosecutor v. Nyiramasuhuko and Others*, Case ICTR-97-21-I (Decision on the Prosecutor's Motion for Joinder of Trials) (5 October 1999) (the "*Nyiramasuhuko* Joinder Decision") in support of this argument.

7. The Prosecutor submits that in order for joinder to be granted, there must be allegations of a "same transaction" as defined in Rule 2 of the Rules.

8. The Prosecutor refers to the decision of Trial Chamber I in *Prosecutor v. Kayishema, Ntakirutimana and Ruzindana*, Case ICTR-95-1-T (Decision on the Motion of the Prosecutor to Sever, to Join in a Superseding Indictment, and to Amend the Superseding Indictment) (27 March 1997), (the "*Kayishema*" Decision). In that decision, the Trial Chamber stated the criteria that must be shown. Specific material elements must be shown that include the existence of a specific criminal act and the existence of a common scheme, strategy or plan.

9. The Prosecution also refers specifically to the appellate decision and dissenting opinion of Judge Shahabuddeen in *Kanyabashi v. Prosecutor*, Case ICTR-96-15-A (Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I) (3 June 1999) (the "*Kanyabashi* Appeal").

10. The Prosecution further relies on the case of *The Prosecutor v. Kabiligi and Ntabakuze*, Case ICTR-97-34-I (Decision on the Defence Motion Requesting an Order for Separate Trials) (30 September 1998) (the "*Kabiligi, Ntabakuze* Motion for Separate Trials") in which Trial Chamber II held that the acts relied on to establish joinder need not be illegal, but they should be connected to material elements of a crime, and the criminal acts to which they are connected must be specific criminal offences and show a common scheme, strategy or plan. Trial

Chamber II noted that this is not meant to be a rigid test, but to provide guidelines for the Tribunal in exercising its jurisdiction.

11. Thus, the Prosecutor submits that the test to be applied in this case is whether the acts are connected to one or more objectively punishable offences, whether those offences are capable of determination in time and space, and whether the acts illustrate a common scheme, strategy or purpose.

The Facts

12. The Prosecutor argues that the factual basis for the joinder can be found in the allegations contained in the indictments and the supporting material to the indictments.

13. The Prosecutor submits that there is a common count of conspiracy against all four accused and that therefore all the accused are charged with committing the same crime. The Prosecutor also notes that all the accused are charged with both individual personal responsibility under Article 6(1) of the Statute and responsibility as superiors for actions of their subordinates under Article 6(3) of the Statute referring specifically to the actions of the members of the military within the military hierarchy.

14. With respect to establishing whether the accused participated in the same transaction, the Prosecutor submits that the allegations in the indictments allege that there was a common scheme to exterminate the Tutsi civilian population and murder political opponents, and that the facts support the participation of all the accused in this plan. In this regard the Prosecutor refers specifically to the Bagosora indictment at paragraphs 5.1, 5.5 to5.14, 5.19, 5.22 to 5.25, 5.28, 5.29, 5.31, 5.32, 5.37, 5.42, 5.43, 6.2, 6.4, 6.7 to 6.11, 6.13, 6.14, 6.20, 6.22 to 6.25, 6.27 and 6.73, and to the equivalent paragraphs in the other indictments.

15. The Prosecutor argues that in addition to the charges set out in Count 1 of each indictment, the remaining counts charge the accused with specific crimes committed by the accused in connection to a common plan or purpose.

16. The Prosecutor submits that joinder of these cases is well-founded because the accused had a common purpose or design which they planned to carry out and did in fact carry out.

17. The Prosecutor argues that the evidence will show that all of the accused were members or former members of the military hierarchy in Rwanda in 1994, and that all of the accused were involved in the preparation or support of the genocide regarding the development of the identification of the "enemy", the use of that term as support for the anti-Tutsi program, the military training and supply of *Interahamwe* militias and other militias, and the dissemination of statements made against the Tutsi population generally.

Interests of Justice

18. The Prosecutor contends that joinder will result in a more consistent and detailed presentation of the evidence because much of the evidence to be presented relates to more than one accused.

19. The Prosecutor submits that joinder will facilitate the appearance of witnesses and enhances their safety and wellbeing.

20. It is the Prosecutor's position that joinder will avoid possible duplication and contradictions in the evidence presented and divergent decisions that would be possible in multiple trials.

Rights of the Accused

21. With respect to whether granting joinder will result in "undue delay" the Prosecutor submits that joinder would create the minimum amount of delay, if any at all. The Prosecutor submits that universal disclosure has been made of all of the statements to all of the accused as of August 1999. Additionally, supporting material for each of the amended indictments was disclosed to all accused. The Prosecutor argues that even if joinder causes delay to an individual case, the total time spent trying three cases of four accused individually would be greater that the time spent trying the four accused jointly.

THE SUBMISSIONS OF THE DEFENCE

Counsel for Bagosora

22. The Defence submits that the Trial Chamber ought to deny the Motion.

(i) Preliminary Matters

23. As a preliminary matter, Bagosora's Counsel expresses concern about the unavailability of documents in French, including previous Tribunal decisions with respect to joinder.

24. Bagosora's Counsel reviewed the procedural history of his client's case in detail. He asks the Trial Chamber to consider that his client has been in custody since March 1996, and that the Tribunal ordered his transfer to Arusha in August of 1996. He reminds the Trial Chamber that in November 1997 it was decided that Bagosora's trial would commence in March 1998. Due to the Prosecutor's request, the trial was adjourned to September 1998. In July of 1998 that date was adjourned when the Prosecutor sought leave to amend the indictment against Bagosora.

(ii) The Law

25. With respect to Rule 48, Counsel for Bagosora argues that it cannot be the basis for the joinder of accused who are separately indicted. He argues that Rule 48 should be interpreted narrowly, and that to do otherwise would violate the rights of his client. He argues that Rule 48 does not allow persons who are not indicted together to be tried together.

26. Bagosora's Counsel submits that it is misguided to believe that Rule 48 is a sufficient basis to grant joinder in this case when the Plenary of the Tribunal deemed it necessary to draft Rule 48 *bis*.

27. Counsel for Bagosora asks the Trial Chamber to consider that in most jurisdictions there is a separation between judicial and legislative branches which he argues does not exist in the case of the Tribunal where the Judges have the power to amend the Rules. Bagosora's Counsel also asks the Trial Chamber to consider the fact that the Plenary can amend the Rules with the Prosecutor present, in the absence of Defence Counsel.

28. With respect to whether the Separate Opinion of Judge Shahabudeen, in the *Kanyabashi* Appeal is persuasive, Bagosora's Counsel submits that the issue of Rule 48 was never put before the Appeals Chamber, but that the Appeals Chamber decided to rule on it of its own accord. He also notes that the separate opinion of Judge Shahabudeen is the separate opinion of only one of five judges and therefore should not be considered persuasive by this Trial Chamber.

29. Bagosora's Counsel argues that to grant joinder in this case would disregard the decision of Judge Khan in *Prosecutor v. Bagosora and 28 Others*, Case ICTR-98-37-I (Dismissal of the Indictment) (31 March 1998) (the "*Bagosora and 28 Others* Decision") in which Judge Khan stated that the Bagosora trial would be adjourned until a decision was rendered in that motion. Counsel argues that the

Trial Chamber decision was rendered 10 March 1998, the appeal was then dismissed by the Appeals Chamber on 8 June 1998 (Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagosora and 28 Others) and the order has never taken effect in that the Bagosora trial had not yet commenced. Counsel for Bagosora states that any continued delay in the commencement of the Bagosora trial would be in contradiction of that order.

30. Bagosora's Counsel submits that paragraph 6.64 of the Bagosora indictment names a number of persons who are not present at this hearing, as well as the four accused, as adopting a strategy that resulted in massacres being perpetrated. Counsel argues that if the persons not present are charged and arrested, there will be a further joinder motion to include them in these proceedings.

(iii) The Facts

31. Bagosora's Counsel contends that the Prosecutor has failed to adduce any evidence of a common transaction between his client and the other accused, nor has she produced any evidence of a common criminal conspiracy.

32. The Defence argues that the Prosecutor must have *prima facie* evidence with respect to the allegations she makes in support of joinder, including documentary and other evidentiary material in support of those allegations.

33. Bagosora's Counsel argues that there are insufficient facts to support joinder beyond the allegations of the Prosecutor. He argues that there is no evidence adduced to support a *prima facie* case for joinder. Counsel submits that evidence in support of joinder, beyond the mere allegations of the Prosecutor before the Trial Chamber, is necessary.

34. Additionally, Counsel submits that the factual basis for joinder presented by the Prosecutor does not stand up to a critical analysis of those facts.

35. In response to the Prosecutor's submission that during a meeting in Kigali, Bagosora took over military control of Rwanda after 6 April 1994 in order to ensure political control, Bagosora's Counsel submits that Kabiligi was not in Rwanda at that time, and Nsengiyumva was in Gisenyi, not Kigali, so that allegations of such a meeting cannot be justified.

36. Counsel refers to a commission set up in 1991, including the four accused and others, which the Prosecutor refers to in support of the allegation of involvement by all accused in a conspiracy. Defence Counsel argues that since a number of others who, according to the Prosecutor, formed part of this commission which was allegedly preparing a genocide, have not been prosecuted, involvement in the commission cannot establish *prima facie* evidence of participation in a conspiracy.

37. Counsel also refers to the allegations of the accused's involvement in the murder of the former Prime Minister, Agathe Uwilingiyimana, and argues that the facts and disclosure to date do not support the allegations that the murder formed part of a conspiracy in which the accused participated.

38. Counsel summarizes that his position with respect to the factual basis for joinder is that the Prosecutor's allegations do not stand up to scrutiny, and that the necessary *prima facie* evidence supporting the facts alleged by the Prosecutor, which he argues is necessary, does not exist.

(iv) Interests of Justice and Rights of the Accused

39. Bagosora's Counsel argues that it is not in the interests of justice that joinder be granted.

40. Bagosora's Counsel asks the Trial Chamber to consider criteria to assess whether any delay arising from joinder would be undue. Those criteria include: the complexity of the case; the attitude of the accused; whether the accused used any delaying tactics; and, the gravity of the charges.

41. Counsel notes that he submitted only one motion as Bagasora's Counsel, and that motion has been decided. He advised the Trial Chamber that he is prepared to start trial immediately.

42. He submits that if joinder is granted in this case, many other accused, some of whom have not yet been arrested, could be joined as well, thus further delaying Bagosora's trial.

43. He also asks the Trial Chamber to note that the Prosecutor has not given a date when it expects a joint trial to commence.

Counsel for Kabiligi

44. Kabiligi's Counsel adopted the arguments of Bagosora's Counsel and also made additional submissions.

45. He argues for a strict interpretation of Rule 48 of the Rules. He submits in order for Rule 48 to apply, the accused would have had to be charged together in one indictment. He also argues that Rule 48 *bis* cannot apply to this motion, as it cannot be applied retroactively.

46. Counsel refers to the *Kayishema* Decision, in which it was held that in order to establish the existence of a same transaction, it was necessary to establish firstly, acts which show the existence of a criminal offence specifically determined in

time and space, and secondly, evidence of a common plan, strategy or scheme in which the accused acted together and in concert.

47. Counsel refers to the argument raised at the hearing of the motion to amend the indictment against Kabiligi and Ntabakuze that there existed a charging policy at the Tribunal known to the Prosecutor and the Trial Chambers, but not to the Defence. Counsel argues that this allegation is a challenge which should be taken up by the Tribunal, and which challenges the impartiality of the Tribunal.

48. Kabiligi's Counsel refers to the *Nyiramasuhuko* Joinder Decision and notes that before the Errata was filed, the decision stated that Trial Chamber II intentionally granted an amendment to the indictment to include a charge of conspiracy as a basis for the joinder request. Counsel urges this Trial Chamber not to follow the *Nyiramasuhuko* Joinder Decision.

(i) Factual Basis

49. Counsel argues that the Prosecutor has produced no evidentiary material in support of joinder. Although the Prosecutor relies on allegations in paragraphs 4.2 to 4.4, 5.1, 5.11, 5.12, 6.2, 6.3, 6.18, 6.30, 6.31, 6.46, 6.49, 6.50 and 6.51, there is no evidentiary basis for these allegations. It is his position that the allegations made by the Prosecutor in support of joinder are not binding on the Tribunal.

50. Counsel reviewed the indictment against his client and refers the Trial Chamber to the paragraphs dealing with his client. He notes that the paragraphs on which the conspiracy charge is based make no mention of Kabiligi. He reviewed in detail the allegations in paragraphs 5.5, 5.10, 5.16, 5.22, 5.25, 5.26, 5.28, and lastly 5.61 and 5.67 which speak of meetings on 6 and 7 April 1994 at which time it is acknowledged by the Prosecutor that Kabiligi was in Egypt. He notes that paragraph 5.2 speaks of the origins of the accused and he notes that Kabiligi is not from the same region as Habyarimana. He also disputes the likelihood of the

meetings alleged by the Prosecutor in paragraph 6.49, between retired officers and battalion commanders.

51. Counsel also denies that the Prosecutor produced any evidence in support of the alleged hierarchical link between the accused. He notes the only document produced by the Prosecutor in support of this allegation is one containing a typed list of names to which Bagosora's name has been added in handwriting. Counsel questioned how the Prosecutor was "able to put with her hand the name of Colonel Bagosora in a document to be put before your Court" and contended that this was a "sacrilege, because it is indeed a case of falsification of a document." Counsel later confirmed that he had no intention of accusing the Prosecutor of falsifying the document. He then advised Trial Chamber that he does not know who falsified the document, but that at a later date he will ask that the document be thrown out.

52. Counsel argues that the Prosecutor has not shown any specific material act by the accused linked to an element of the crime. He contends that the Prosecutor has shown no link between any such acts and specific facts capable of determination in space and time. He also argues that there has been no evidence of a common plan, scheme or strategy.

53. Counsel's position is that the civil law requires a nexus for joinder. The required nexus is that a decision on one matter would necessarily have an impact or effect on other matters, based on objective elements. In this case, if the Prosecutor were able to prove conspiracy, complicity or a common criminal transaction, then there would be an objective element which would justify joinder.

54. Counsel contends that if the joinder is to be based on the accuseds' membership in the Rwandan Armed Forces, that reasoning is flawed because Bagosora was a retired soldier in 1994.

55. Counsel notes that the Prosecutor made reference to the Nuremberg trials, however he argues that the reference is not relevant to the present case. The basis for trying twenty-four accused together was a specific instrument that made it possible for the Nuremberg Tribunal to charge organizations, and to charge individuals on the basis of their membership in organizations. This Tribunal does not have jurisdiction to prosecute organizations, nor does it have jurisdiction to prosecute individuals on the basis of their membership in organizations.

(ii) Interests of Justice

56. Kabiligi's Counsel argues that there would be no risk to potential witnesses in attending at Arusha several times to give evidence.

(iii) Prejudice

57. Counsel submits that joinder could lead to a conflict of interest in defence strategies and the presentation of the case by Defence Counsel. He refers to the decision of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") in *Prosecutor v. Kovacevic*, IT-97-24 (Decision on the Prosecution Motion for Joinder of Accused and Concurrent Presentation of Evidence) (14 May 1998) in support of this argument.

58. Counsel argues that in this case, joinder would lead to confusion, ammalgamation and possible conflict of interest between his client and the other accused. He contends that joinder would make a full and unfettered defence difficult. He also argues that it would be difficult to produce all the testimony for his client without being compelled to take into account the interests of the other accused.

59. Counsel also argues that joinder would lead to a prolongation of the proceedings.

60. Counsel notes that the accused are not at the same stage in the proceedings and questions what will happen when others named in the indictment, who have not yet been apprehended, are arrested. He states that he does not believe that the Prosecutor will not move to join these others once they are arrested.

61. Lastly Counsel argues that the Prosecutor is attempting to use the joinder process to achieve what has already been denied by Judge Khan in the *Bagosora and 28 Others* Decision.

Counsel for Nsengiyumva

(i) Delay

62. Counsel for Nsengiyumva's first objection to this motion is on the basis of delay. He argues that in September 1997, the defence filed a motion seeking to set a trial date. At that time, the Prosecutor promised the court that it would bring a motion for joinder by November 1997 and thus the trial date was adjourned. Counsel submits that although a trial date of 9 February 1998 had been set for his client, on 5 February 1998, the Prosecutor filed a motion for an adjournment on the basis that she intended to file a joint indictment. The Prosecutor brought a motion to join Nsengiyumva with 28 others in one indictment, which was denied by both Judge Khan and the Appeals Chamber.

63. Counsel disagrees with the Prosecutor's contention that she is not responsible for the accused's period of custody in Cameroon.

64. The Defence argues that the fact that the Prosecutor filed the Motion while the accused's motion to strike the initial indictment was pending, and the Prosecutor's failure to comply with a decision of Trial Chamber I, in *Prosecutor v. Nsengiyumva,* Case ICTR-96-12-I (Decision on the Defence Motion to Strike Out the Indictment) (24 May 1999) (the "*Nsengiyumva* Decision"), to make certain amendments to the initial indictment, render this motion a nullity.

(ii) Evidence

65. The Defence also opposes the Motion on the basis of an alleged lack of evidence in support of the Motion. In particular the Defence argues that there is no evidence in support of the allegation of a conspiracy between the accused. He alleges there is no evidence in support of either the military or personal relationships alleged by the Prosecutor. It is Counsel's position that the Trial Chamber cannot rely on allegations contained in the indictments as the basis for joinder.

66. Counsel argues that there is no evidence that any offence arose from the identification of the "enemy" as alleged in the Motion. He argues that there is no evidence that Nsengiyumva was involved in the distribution of arms. He argues that any evidence that the accused was a member of a commission is not relevant to the motion as there is no offence in having formed part of a commission. He argues that although the Motion speaks of massacres, there is no evidence linking Nsengiyumva to those massacres. He submits that evidence of being part of a military structure is not evidence of an offence. He argues that allegations of a superior-subordinate relationship are not supported by evidence and allegations of personal relationships are irrelevant. He also submits that allegations with respect to a phone call from Bagosora to Nsengiyumva on or about 7 April 1994, after which the killings commenced, are "ridiculous" and "unbelievable."

67. Counsel notes that the Prosecutor has not given the names of any of the political figures allegedly killed, and contends that the Prosecutor's allegations are vague and do not involve his client.

68. The Defence argues that any allegations made by the Prosecutor must be in the form of an affidavit, pursuant to Article 27 of the Directive for the Registry which

requires parties to file an affidavit when requesting the Trial Chamber to make a determination on a question of fact in dispute.

69. Counsel notes that of the eleven counts against Nsengiyumva, only one mentions any of the other three accused.

(iii) The Law

70. Counsel refers to the decision of *D.P.P. v. Merriman,* [1973] A.C. 584 (House of Lords), as support for the proposition that joinder can only occur where the accused have been charged together in one count.

71. Counsel notes that if joinder is granted there would be over forty counts to be dealt with in one trial. He relies on the decision of *D.P.P. v. Arthur,* [1943] Criminal Appeal Reports 43 (House of Lords) ("*Arthur's* Case"), as support for his position that such a trial would be unwieldy. He refers to *Arthur's* Case in arguing that the accused would be prejudiced as regards each of the charges by the evidence which is being given upon the other charges.

72. He also refers to the decision of *R. v. Shaw*, [1942] 2 All E.R. 342 ("*Shaw's* Case"), in which case the court found that it would be unreasonable to expect a jury to grasp and retain evidence in its entirety concerning separate acts of individual accused.

73. Counsel notes the decision of *Kotteakos v. United States* (1946), 328 U.S. 750, 66 S.Ct. 1239 in which the Supreme Court of the United States held that the rights of an accused can be substantially prejudiced by joinder where the only nexus among them lies in the fact that one man participated in all the conspiracies. He argues that in the present case, there is no evidence to support the allegation that the accused jointly committed any offence and thus there is an absence of a nexus.

(iv) Prejudice

74. Counsel argues that there are substantial and significant differences in the defence strategy of each of the accused, and that his client's defence will be prejudiced if these cases are tried together.

75. Lastly, Counsel advises the court that he fully adopts the arguments of Counsel for Kabiligi and Bagosora.

Counsel for Ntabakuze

76. Ntabakuze's Counsel made a number of preliminary arguments. His first argument, as set out in his "Motion to Declare the Indictment Void *ab initio*," is that the Trial Chamber lacks the jurisdiction to hear the Motion because the indictments on which the Motion is based are null and void. He also argues that the indictments, as amended, are not valid because the new counts were never confirmed.

77. The second preliminary point argued by Ntabakuze's Counsel, included in his "Motion Objecting to a Lack of Jurisdiction," is that the Trial Chamber lacks jurisdiction to hear the Motion because the indictment contains matters that are outside the temporal jurisdiction of the Tribunal as set out in Article 7 of the Statute.

78. Counsel's third preliminary objection to the Motion, as set out in Ntabakuze's "Motion Objecting to a Lack of Jurisdiction," is that the Trial Chamber lacks jurisdiction to hear the Motion because the indictment makes allegations dealing with the Rwandan Armed Forces, as an institution, while Article 5 of the Statute only gives the Tribunal jurisdiction over natural persons.

79. Counsel argues that joinder of cases involving conspiracy charges would result in the evidence of one accused being admitted against all four accused, and thus prejudice the accused.

80. The last objection raised by Counsel for Ntabakuze is that the Chamber lacks jurisdiction to hear this motion because there is no provision in the Rules which allows for joinder at this stage of the proceedings. He argues that Rule 48 only allows for joinder if the accused are charged together. He contends that if Rule 48 had been meant to apply to situations where the accused were charged separately, Rule 48 *bis* would not have been drafted. These arguments are set out in Ntabakuze's "Motion Seeking to Have Rule 48 *bis* Declared *Ultra Vires*, Unlawful, Contrary to the Rules of Procedure and Evidence, and Inapplicable to the Accused" and Ntabakuze's "Motion for a Declaratory Ruling in Order to Determine the Law Applicable to the Prosecutor's Motion for Joinder filed on 28 October 1999, Prior to Hearing Said Motion."

PROSECUTOR'S REPLY

81. The Prosecutor notes that despite numerous references by Defence Counsel to Judge Khan's *Bagosora and 28 Others* Decision, in that decision Judge Khan stated that the appropriate procedure is one of joinder.

82. The Prosecutor states that she is ready to start trial upon the determination of joinder.

83. The Prosecutor argues that with respect to the evidence, joinder can be determined on the Statement of Facts and the charges contained in the indictments. The question the Trial Chamber should ask itself is whether the factual allegations indicate the existence of a "same transaction." Whether or not these allegations can be proven is a matter for trial.

84. With respect to the concerns raised by Counsel that the Tribunal is the drafter of its own Rules, the Prosecutor notes that this is also the case with the International Court of Justice and the European Human Rights Commission.

85. The Prosecutor asks the Trial Chamber to apply the Vienna Convention on the Law of Treaties to its interpretation of Rule 48. Article 31(1) states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The Prosecutor asks the Trial Chamber to find that Rule 48 can be the basis for joinder in these circumstances. Otherwise, there would be no possibility for joinder if new facts came to light after the initial indictment.

86. On the issue of a nexus between the accused, the Prosecutor clarified that Bagosora was the Director of the Office of the Minister of Defence in 1994. This position is the second in charge of the Ministry of Defence. Below the Director, in terms of military hierarchy, are the Chief of Staff of the Army and the Chief of Staff of the Gendarmerie. In the army, the position directly below the Chief of Staff is the Commander of Military Operations; a position held by Kabiligi. Directly below Kabiligi are a number of positions, including the Commander of the Para-Commando Battalion, Ntabakuze, and the Commander of the Gisenyi Region, Nsengiyumva.

87. With respect to what will happen if others named in the indictments are arrested, the Prosecutor refers to the *Cyangugu* Joinder Decision which determined that such an issue can be considered at the appropriate time.

88. The Prosecutor concludes by noting that a motion for joinder is not the proper forum for matters of evidence.

DELIBERATIONS

Preliminary Matters

(i) Preliminary Motions by Ntabakuze

89. The Trial Chamber finds no merit in the oral motion raised by Counsel for Ntabakuze, that the Trial Chamber lacks jurisdiction to hear the Motion because it is not accompanied by an affidavit. The Trial Chamber notes that in support of this motion, the Prosecutor relies on the allegations contained in the indictments. It is not necessary at this time for the Prosecutor to prove the truth of these allegations, nor is it necessary for the Prosecutor to provide evidence in affidavit format to establish a basis for joinder. We are not considering proof of evidence to maintain joinder. What we are considering is whether there is a sufficient basis for joinder. It appears as if the respective Counsels for the various accused have misconstrued the nature of the proceedings. This is not the time for proof. If there is proof, that will come at the Trial. That issue will have to be adjudicated on at that time. This position was also adopted by the ICTY in *Prosecutor v. Kordic*, IT-95-14/2 (Decision on the Defence Motion to Strike the Indictment for Vagueness) (2 March 1999).

90. With respect to Ntabakuze's motion for a declaratory ruling in order to determine the law applicable to the Prosecutor's motion, Ntabakuze's motion seeking to have Rule 48 *bis* declared *ultra vires*, Ntabakuze's motion to declare the indictment void *ab initio*, and Ntabakuze's motion objecting to lack of jurisdiction, the Trial Chamber has ruled on those motions in separate decisions as follows: Decision on Ntabakuze's Motion for a Declaratory Ruling in Order to Determine the Law Applicable to the Prosecutor's Motion for Joinder Filed on 28 October 1999, Prior to Hearing the Said Motion, (4 May 2000); Decision on Ntabakuze's Motion Seeking to have Rule 48 *bis* Declared *Ultra Vires*, Unlawful, Contrary to the Rules of Procedure and Evidence and Inapplicable to the Accused, (4 May 2000); and Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void *Ab Initio*, (13 April

2000). The Trial Chamber rejects Mr. Monterosso's submissions that is does not have jurisdiction to hear the Prosecutor's motion for joinder.

(ii) Preliminary Objection filed by Nsengiyumva

91. Nysengiyumva's objection to the composition of the Trial Chamber, filed on 23 September 1998, has been rendered moot by the *Kanyabashi* Appeal, in which Defence Counsel's submission that the recomposition of the Trial Chamber negated the jurisidiction of the Trial Chamber was rejected.

92. Thus, the question of the composition of the Trial Chamber has become moot and the Trial Chamber will not consider further Nsengiyumva's objection.

(iii) Submissions made by Counsel

93. Mr. Degli, Counsel for Kabiligi, in making his submissions, in some respects crossed the bounds of propriety. We expressed our views on this during the hearing but in our view it is important that it be stressed so as to avoid a repetition of such conduct in the future. A certain measure of decorum is to be expected from Counsel. Counsel should bear in mind that he is an officer of the court and as such should conduct himself accordingly.

94. With respect to Mr. Degli's submissions about a charging policy in existence between the Trial Chamber and the Office of the Prosecutor, this Chamber has already made clear that it is not aware of any such policy. The Prosecutor is quite at liberty to have her own policy. This matter has been dealt with previously and it is not proper for Counsel to continue to raise it. The Trial Chamber has already expressed its view on this matter. We hope that this matter will now be put to rest.

95. Counsel for Nsengiyumva alleges that the Prosecutor filed the Motion while a decision was pending on an application to strike out the initial indictment. However, this is not an issue properly before this Trial Chamber, so we will not deal with it further. This matter was previously dealt with by Trial Chamber I in the*Nsengiyumva* Decision.

96. Counsel for the Defence have also raised issues with respect to the confirmation and amendment of the indictments. The Trial Chamber rejects all such arguments. No issue concerning the validity of the indictments can now be raised. This issue has already been determined. It cannot now be reopened, nor will any further challenges with respect to the indictments be tolerated.

97. Counsel for Nsengiyumva, Mr. Ogetto, submitted that once a person is indicted, he is under the jurisdiction of the Tribunal, no matter what country he is in. We do not share that view. It is important that a clear distinction be made between the Tribunal having jurisdiction to do a particular act as distinct from a suspect or accused being in the custody of the Tribunal. These two issues should not be confused. A suspect or an accused is not in the custody of the Tribunal until such a person is transferred to the seat of the Tribunal or has arrived at the seat of the Tribunal, at which point such a person is under the control of the Tribunal.

98. Any comparisons by Nsengiyumva's Counsel of this Tribunal with administrative tribunals are not appropriate. Superior courts exercise supervisory jurisdiction over those bodies. A decision dealing with inferior or administrative tribunals is of little use to us because those bodies do not equate with an international tribunal.

(iv) Documents filed by Counsel for Kabiligi and Nsengiyumva

99. It is to be noted that when Counsel for Kabiligi and Nsengiyumva filed their briefs, they combined their responses to the Prosecutor's motion to Amend the

Indictments, and the Motion for joinder in one document. The amended indictment was previously dealt with and a decision was rendered with respect to same by Trial Chamber I on 2 September 1999 with respect to Nsengiyumva, and by Trial Chamber III on 9 October 1999 with respect to Kabiligi. The matter now pending is the Motion for joinder which is being dealt with at this time.

Legal Basis for Joinder

(i) Rule 48 as a Basis for Joinder

100. Rule 48 provides for joinder of accused persons. The Trial Chamber finds that it can decide this Motion on the basis of Rule 48, as interpreted in the *Kanyabashi* Appeal and the Cyangugu Joinder Decision.

101. The application of Rule 48 to join accused who have been separately indicted receives support in the Separate and Dissenting Opinion of Judge Shahabuddeen in the *Kanyabashi* Appeal (at pp. 14-17).

102. It is also to be noted that in this decision, Judge Shahabuddeen confirms that the Appeals Chamber has accepted the above interpretation of Rule 48 in the following statement:

> One interpretation of the Rule [48] is that persons who satisfy the stated test may be "jointly ... tried" only if they have been "jointly charged...", thus reflecting the traditional common law rule relating to joinder *stricto sensu*. Another interpretation [of Rule 48] is that the provision also embraces the possibility that such persons may be "jointly ... tried" even if they have not been "jointly charged...", thus reflecting the principle of consolidation. The Prosecution has proceeded on the basis of this latter and wider interpretation, Trial Chamber I has implicitly accepted it, and the Appeals Chamber has now effectively adopted it. The former interpretation is attractive; but not sufficiently so to justify non-acceptance of the adoption of the latter by the Appeals Chamber, and more particularly so in view of the inherent authority on the basis of which courts in some jurisdictions order consolidation.

(ii) Joinder in Common Law and Civil Law Jurisdictions

103. In common law jurisdictions, questions of joinder lie entirely within the discretion of the court, which has inherent power to formulate its own rules. The case of *R. v. Assim*, [1966] 2 All ER 881, supports this view. (*See* paragraph 104, below.)

104. The Trial Chamber notes Lord Morris' speech in *Director of Public Prosecutions v. Doot & Others,* (1973) A.C. 807 (House of Lords), in which he said:

> My Lords, as was pointed out in *Reg. v. Assim* [1966] 2 Q.B. 249, questions of joinder, whether of offence or of offenders, are considerably matters of practice on which the court unless restrained by statute has inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. Here is esentially a field in which rules of fairness and of convenience should be evolved and where there should be no fetter to the fashioning of such rules.

105. In the Joint and Separate Opinion of Judge McDonald and Judge Vohrah in the *Kanyabashi* Appeal, the Judges observed at paragraph 32 as follows:

> It is well accepted in some common law jurisdictions that joining accused in one indictment where the "same transaction" test is met can be initiated by the prosecutor or by an order of the court if justice so requires. The public interest clearly dictates that joint offences may be tried together.

106. In civil law jurisdictions joinder may be granted if *connexité* exists between the crimes with which the accused are charged, even at the initiative of the court. Joinder may occur regardless of whether the accused are indicted together in one indictment or separately.

(iii) Conclusion on the Legal Basis for Joinder

107. It is clear from the foregoing that under the interpretation of Rule 48 advanced in the *Kanyabashi* Appeal, accused persons can be jointly tried, even if they were not jointly charged. Further, joinder of indictments is possible under both civil and common law systems.

108. Taking into account the jurisprudence of the Tribunal and that of national jurisdictions, it is therefore clear that where the public interest dictates joint offences may be tried together. In appropriate circumstances the Trial Chamber may so order quite apart from the provision of the Rules allowing for joinder, which do not restrain the Trial Chamber from granting joinder, but rather, under Rule 48, permit joinder. The question of joinder is also one of practice. If the allegations contained in the indictment support the existence of a common transaction amongst the accused, and if no material prejudice arises to the accused as a result of joinder, joinder may be granted.

109. The jurisprudence of the Tribunal clearly establishes that the application of Rule 48 and common law practice considerations are appropriate in these circumstances.

110. Defence Counsel failed to take into account the totality of Judge Khan's *Bagosora and 28 Others* Decision,but relied only on such very limited portions as they considered helpful to them. Furthermore, Judge Khan was dealing with a request to confirm an indictment of twenty-nine accused, some of whom had been previously indicted and made their initial appearances, and others who were still at large. The Prosecutor brought the motion *ex-parte*, with respect to the accused who had already made their initial appearances. Obviously this was too many accused in one indictment. Additionally, the Prosecutor was asking for an unwarranted usurpation of the jurisdiction of the Trial Chambers seized of the Indictments of the accused who had already made their initial appearances and the process requested by the Prosecutor would circumvent the express provisions of the Rules that guarantee the right of the Defence to be heard.

111. Judge Khan stated that if the Prosecutor, in her ongoing investigations, collected information which jointly implicated new suspects and the existing accused, she could pursue this endeavour within the framework of the Rules, so that any

judicial decision would be rendered in the presence of the accused. This is the approach the Prosecutor has now taken in the Motion.

Application of Rule 48 bis

112. The Trial Chamber decides this Motion by applying Rule 48. We therefore do not propose to make any ruling on the legal validity of Rule 48 bis as this is not necessary in the circumstances.

113. At this time, the Trial Chamber notes that in Defence Counsel's submissions with respect to Rule 48 bis, he refers to the process by which the Tribunal amends its Rules. The Trial Chamber draws to the attention of Counsel that the Prosecutor does not participate in the decision making process with respect to amendments of the Rules. This is done by the Judges alone. Additionally, Defence Counsel expressed concern about the Tribunal having the power to create and amend its Rules. It is the Plenary, consisting of the Judges who make the Rules. This is not an unusual procedure as both the International Court of Justice and the European Human Rights Commission make their own rules.

Legal Criteria for Joinder under Rule 48

114. According to Rule 48, persons accused of the same crime or different crimes committed in the course of the same transaction, may be jointly charged and tried. Rule 2 defines the term "transaction" as "a number of acts or omissions whether occurring as one event or a number of events at the same or different locations and being part of a common scheme, strategy or plan."

115. In *Kayishema*, at page 3, Trial Chamber I held that:

> involvement in a same transaction must be connected to specific material elements which demonstrate on the one hand the existence of an offence, of a criminal act which is objectively punishable and specifically determined in time and space, and on the other hand prove the existence of a common scheme, strategy or plan, and that the accused therefore acted together and in concert.

116. In the *Kabiligi, Ntabakuze* Motion for Separate Trials, Trial Chamber II considered the issue of joinder under Rule 48 and quoted the above passage from the decision in *Kayishema*. The Trial Chamber stated:

> The above interpretation has created argument as to whether the acts or omissions which are alleged to form the same transaction necessary for joinder ("acts of the accused") must be criminal/illegal in themselves or not. This Trial Chamber is of the opinion that the acts of the accused need not be criminal/illegal in themselves. However, the acts of the accused should satisfy the following:
>
> 1. Be connected to material elements of a criminal act. For example the acts of the accused may be non-criminal/legal acts in furtherance of future criminal acts;
> 2. The criminal acts which the acts of the accused are connected to must be capable of specific determination in time and space, and;
> 3. The criminal acts which the acts of the accused are connected to must illustrate the existence of a common scheme, strategy or plan.

117. Trial Chamber II further stated that "these guidelines are not intended to be a rigid insurmountable three prong test," at page 2 of the decision.

118. On the basis of these precedents, there are a number of elements that must be shown to exist to grant a motion for joinder of accused. There must be acts of the accused, which are connected to an objectively-punishable criminal offence, this offence must be capable of specific determination in time and space, and the acts of the accused must illustrate the existence of a common scheme, strategy or plan, in which the accused was involved.

Factual Basis Required to Support Joinder

119. The Trial Chamber now considers the question of the amount and the cogency of evidence which must be adduced to satisfy this test, before proceeding to consider the application of this test to the instant case.

120. In the *Kabiligi, Ntabakuze* Motion for Separate Trials, Trial Chamber II held that "[f]or the purposes of joinder, in the absence of evidence to the contrary, the Trial Chamber shall act upon the Prosecutor's factual allegations as contained in the indictment and related submissions,"at page 2 of the decision.

121. At this stage of the proceedings, only allegations can be made. These allegations will have to be proved at the trial. This is not the stage of the proceedings where proof is established. We are not having two trials; one at the joinder stage and one at the trial stage.

122. The Trial Chamber notes that Mr. Constant, in particular, treated us to a massive review of the evidence, but with all respect to him, this is not the occasion for that approach. That approach is more suited to the trial than a motion for joinder. This is not the stage at which a thorough review of the evidence is required. We are not at this point in time trying the case.

Factual Basis for Joinder

123. The Trial Chamber has considered the allegations of fact that the Prosecutor has made in the indictments, the Motion and the Brief. The Trial Chamber considers these allegations in light of the above criteria for the application of Rule 48, to determine whether the allegations, if proven, would establish that the crimes with which the accused are charged, were committed in the course of the same transaction.

124. Defence Counsel allege that there is no evidence that the accused are linked to specific material acts and that there is no evidence to support the allegations that the accused jointly committed any offence. Defence Counsel argue that in the absence of any nexus or link, the accused will be prejudiced by joinder.

125. The Trial Chamber observes that in Count 1 of each indictment it is alleged that the accused all conspired to commit genocide.

126. The Trial Chamber notes, that in the concise statement of facts in the Nsengiyumva indictment, it is alleged that Nsengiyumva acted in concert with Bagosora, Ntabakuze and others in planning, preparing and executing a common scheme, strategy or plan to commit the atrocities alleged in the indictment.

127. In the concise statement of facts in the Bagosora indictment it is alleged that Bagosora acted in concert with Kabiligi, Ntabakuze, Nsengiyumva and others in planning, preparing and executing a common scheme, strategy or plan to commit the atrocities alleged in the indictment.

128. In the concise statement of facts in the Kabiligi and Ntabakuze indictment it is alleged that Kabiligi and Ntabakuze acted in concert with Bagosora, Nsengiyumva and others in planning, preparing and executing a common scheme, strategy or plan to commit the atrocities alleged in the indictment.

129. The Trial Chamber notes that the Prosecutor advised in oral submissions and in the Bagosora indictment that Bagosora held the positions of second-in-command of the École Supérieure Militaire in Kigali, Commander of Kanombe and Director of the Office of the Minister of Defence while he was in the military. On his retirement from the military he continued to hold the position of the Director of the Office of the Minister of Defence, a position which he held during the time of the alleged attacks against the Tutsi population. The Prosecutor described the alleged hierarchical link between the four accused during the time of the massacres, in its oral submissions and in the indictments.

130. With respect to the assertions made by Counsel for the Defence negating a hierarchical link between the accused, there is no evidence in support of such allegations, save the statement of Defence Counsel

131. Defence Counsel have argued that involvement in the military is irrelevant to the allegations of conspiracy. The Trial Chamber notes that it is not solely a question of being part of the military, but as such the accused are alleged to have agreed to do certain acts, and to have carried out these acts jointly and in their individual capacity.

132. Counsel have raised the argument that involvement in a commission cannot amount to evidence in support of involvement in a conspiracy because others involved in the same commission have not been charged. This reasoning is flawed. The Prosecutor in her discretion may decide to proceed or not to proceed against a particular individual. The Trial Chamber will concern itself only with those persons against whom charges are laid.

Factual Basis for the Charge of Conspiracy

133. Conspiracy is being considered in the context of Count 1 of the indictments, namely conspiracy to commit genocide.

134. The Trial Chamber has reviewed the various authorities cited by Counsel with respect to the evidence required to establish conspiracy, some of which are not helpful.

135. The Trial Chamber in its previous decisions *Prosecutor v. Nsengiyumva*, ICTR-96-12-I (Decision on the Defence Motions Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment) (13 April 2000) and *Prosecutor v. Ntabakuze*, ICTR-96-43-I (Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void ab Initio) (13 April 2000) dealt in more detail with respect to the conspiracy issue and cited authorities with respect to same. In the circumstances, we do not consider it necessary to repeat the views expressed in those decisions.

136. For the purposes of this decision, a full analysis of the crime of conspiracy is not necessary. The appropriate stage for such an analysis is at trial. It is sufficient to identify the elements of conspiracy in order to determine whether the allegations made out by the Prosecutor, if proven true at trial, will establish a conspiracy amongst the accused. If that is the case, then there is a basis on which this Trial Chamber may grant joinder.

137. As in the Cyangugu Decision, the Trial Chamber is of the opinion that to establish the existence of a conspiracy, it is not necessary for the Prosecution to prove that the accused all acted together and at the same time. It is sufficient to establish that the accused had a common purpose or design, that they planned to carry out that purpose or design and that they executed that plan. The ICTY stated in *Prosecutor v. Kordic, Prosecutor v. Cerkez*, Case IT-95-14/2 at para. 10 (Decision on Accused Mario Cerkez's Application for Separate Trial) (7 December 1998) that, "[i]t is not necessary to prove a conspiracy between the accused in the sense of direct coordination or agreement."

138. The Trial Chamber notes that all the accused in a conspiracy need not know or be in contact with every other person in the conspiracy. Where there are a series of agreements or relationships all of which are regarded as essential to the pursuit of a single large-scale scheme, the agreements or relationships may be regarded as a link in the overall chain of relationship. The Trial Chamber is of the opinion that the charge of conspiracy, as set out in the Indictments, by its very nature, requires that these accused be tried together, provided that the other conditions of joinder are met.

139. The Trial Chamber is of the opinion that the Prosecutor's allegations, if proven, establish a connection between Bagosora, Kabiligi, Ntabakuze and Nsengiyumva in the sense that they participated in the same transaction. Consequently, the Trial Chamber is of the opinion that the submissions of the Prosecution, based on the

Indictments, the Motion and the Brief, provide a sufficient basis for concluding that the criteria for joinder as laid down in Rule 2 and Rule 48 are complied with. It remains to be seen whether these allegations will be proven at trial. The Trial Chamber finds that there is a sufficient basis for joinder.

140. Once it is established that a common transaction has occurred, the Trial Chamber must review other relevant considerations.

141. The Trial Chamber therefore must consider the advantages of granting a motion for joinder, and weigh the benefits against the possibility of prejudice to individual accused.

The Interests of Justice

142. The decision whether to grant joinder lies within the discretion of the Tribunal. In the exercise of its discretion, the Trial Chamber must weigh the overall interests of justice and the rights of the individual accused. *See R.* v. *Assim, infra* at paragraph 103.

143. The ICTY, in *Prosecutor v. Delalic, Mucic and Delic*, Case IT-96-21-T, at para. 35 (Decision on the Motion by Defendant Delalic Requesting Procedures for Final Determination of the Charges Against Him) (1 July 1998), described the rationale for joinder of offenders as follows:

> There are reasons of undoubted public interest why joint offences should be tried jointly. Savings in expense and time are a factor of importance. It is also desirable, and in the interests of transparent justice, that the same verdict and the same treatment should be returned against all the persons jointly tried with respect to the offences committed in the same transaction. It is also to avoid the discrepancies and inconsistencies inevitable from the separate trial of joint offenders. Hence, the principles of administration of criminal justice have always accepted the practice of trying joint offenders irrespective of the attendant inevitable minimum prejudices.

144. In addition to these advantages, joinder allows for a more consistent and detailed presentation of the evidence. It allows for better protection of the victim's and witnesses' physical and mental safety by eliminating the need for them to make several journeys and to repeat their testimony. Lastly, joinder may reduce the risks of contradictions in the decision rendered when related and indivisible facts are examined. *See Prosecutor v. Kayishema,* Case ICTR-95-1-T, at p. 3 (Decision on the Joinder of the Accused and Setting the Date for Trial) (6 November 1996).

Prejudice

145. Counsel for Nsengiyumva referred the Trial Chamber to a number of authorities in support of his argument that joinder would result in prejudice to his client. In this regard the Trial Chamber notes that both *Arthur's* and *Shaw's* Case deal with joinder in the context of jury trials and thus the considerations expressed in those decisions are not relevant to the situation before this Tribunal which involves a determination of the issues by judges alone. In a jury trial, where intricate legal issues have to be explained to the jury, the situation may become confusing to them, whereas when the trial is by Judges alone, this concern does not arise.

146. From the information adduced there was no specific showing that there would be "contamination" of the evidence against individual accused, nor was any prejudice shown. The Trial Chamber will judge each individual accused solely on the basis of the evidence adduced against each accused. Evidence against one accused is not evidence against another accused. Furthermore, that joint trials are envisioned by the Rules is apparent from Rule 82 which articulates that the rights of the accused in a joint trial are the same as if he were being tried separately.

Delay

147. Before reaching a conclusion the Trial Chamber must also satisfy itself that a joinder would not infringe the right of the accused to trial without undue delay as laid down in Article 20(4)(c) of the Statute and other international human rights instruments. Among relevant criteria according to human rights case law are the complexity of the case, the conduct of the authorities and the conduct of the accused including whether the case has been pursued with sufficient diligence.

148. It is necessary to look at the totality of the situation and the legal reasons for joinder in spite of some amount of delay.

149. In national jurisdictions the same principles have been expressed in similar ways. For instance in the case of *Barker* v. *Wingo*, 407 U.S. 514 (22 June 1972), the Supreme Court of the United States observed (at p. 530):

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

150. In *O'Flaherty* v. *Attorney General of St. Christopher and Nevis and others* (1986) 38 West Indian Reports 146, the court held:

> There is no formula as to what constitutes unreasonable delay, there is no inflexible rule, each case has to be looked at in the light of its own circumstances and the balancing of the conduct of the applicant and that of the respondents and the existing facilities.

151. Counsel for the Defence have argued for a firm trial date, however, it is difficult to set a binding date for the start of trial because of the numerous motions filed by some of the Defence Counsel. It is more desirable to dispose of pending motions before trial.